

REMARKS

The Office action dated April 12, 2007 asserts that the application contains claims directed to the following patentably distinct species:

- I. Claims 18-33, drawn to an IMD with battery monitor, classified in class 607, subclass 60.
- II. Claims 40-47, drawn to a method of conserving power through programming, classified in class 607, subclass 59.

However, claims 45-47 directly or indirectly depend from claim 18 and thus, should be included in the Group I.

**Traversal of Restriction Requirement**

All the currently pending claims 18-33 and 40-47 should be examined in the pending patent application in the interest of efficiency in examination for the USPTO and fairness to the applicant. 37 CFR 1.142 (a) supports the policy to issue the restriction requirement prior to the issuance of an Office Action on the merits and MPEP 811 also gives further guidelines for in the issuance of the restriction requirement as early as possible.

First, 37 CFR 1.142(a), second sentence, indicates that a restriction requirement "will normally be made before any action upon the merits." In the present case an Office Action was issued, on the merits, on October 10, 2006 and the applicant then spent significant time, expense and resources to prepare and file a formal response to the Office Action on January 10, 2006. Next the current restriction requirement was issued on April 12, 2007. Because the restriction requirement was issued after a office action on the merits, the issuance of the current restriction requirement would be contra to the recommendation of 37 CFR 1.142(a).

Second, MPEP 811 indicates that the examiner should make a proper restriction requirement as early as possible ... or as soon as the need for a proper requirement develops. The response filed on January 10, 2006 did not amend the claims in a manner that created the need for the current restriction. Under this guideline, the restriction is improper because it is issued after the examiner's search of both groups of claims, issuance of an office action on the merits of both groups of claims and the applicant's formal response to the office action.

Third, MPEP 811 further indicates that before making a restriction after the first action on the merits the examiner "will consider whether there will be a serious burden if restriction is not required." Since the examiner has already performed searches for both Groups in order to issue the first office action (January 10, 2006) and the applicant has also spent significant time, expense and resources to respond to the first office action, it would not be a serious burden to the examiner (to examine the claims in both Groups) if restriction is not required. It would only increase burdens on both the applicant and the U.S. Patent and Trademark Office to restrict the claims at this time in the prosecution (after search and examination has already been carried out on both groups of claims) and require the filing and prosecution of a divisional application (and re-doing of the search and examination already carried out) to seek patentability for non-elected claims.

### **Conclusion**

In conclusion, it is respectfully requested that the restriction requirement be retrated, because of the aforementioned reasons and the current state of the application. In the interest of efficiency to the USPTO and fairness to the applicant all pending claims 18-33 and 40-47 should be examined in the current application because doing so will not place a serious burden to the examiner. The examination of all pending claims 18-33 and 40-47 would not place a serious burden on the examiner under the standard of MPEP 811.

The Examiner is invited to contact the undersigned by telephone if it is felt that a telephone interview would advance the prosecution of the present application.

The Commissioner is hereby authorized to charge any additional fees which may be required regarding this application under 37 C.F.R. §§ 1.16-1.17, or credit any overpayment, to Deposit Account No. 50-0872. Should no proper payment be enclosed herewith, as by a check or credit card payment form being in the wrong amount, unsigned, post-dated, otherwise improper or informal or even entirely missing, the Commissioner is authorized to charge the unpaid amount to Deposit Account No. 50-0872.

If any extensions of time are needed for timely acceptance of papers submitted herewith, Applicant hereby petitions for such extension under 37 C.F.R. §1.136 and authorizes payment of any such extensions fees to Deposit Account No. 50-0872.

Respectfully submitted,

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